Filed 10/2/03 P. v. Huerta CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE ALBERTO HUERTA,

Defendant and Appellant.

F041567

(Super. Ct. No. SC084340B)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

Shama H. Mesiwala, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, and John G. McLean, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Dibiaso, Acting P.J., Vartabedian, J. and Cornell, J.

George Alberto Huerta was convicted of possession of methamphetamine; possession of drug paraphernalia; possession of a firearm by a felon; and possession of ammunition by a felon. (Health & Saf. Code, §§ 11377, 11364; Pen. Code, §§ 12021, subd. (a)(1), 12316, subd. (b)(1).)[1] Huerta contends the trial court erred in failing to instruct the jury with CALJIC No. 17.01, the unanimity instruction, and that the sentence on his conviction for possession of drug paraphernalia must be stayed pursuant to section 654. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

Bakersfield police executed a search warrant at the home Huerta shared with his wife, Marisela Mendivil, and their two children. The police discovered almost 60 grams of methamphetamine, along with other indicia of methamphetamine sales: digital scales, loaded firearms, packaging materials, a pipe for smoking methamphetamine, a cell phone and over $400 in cash.

Huerta and Mendivil were charged with possession of a controlled substance for sale (Health & Saf. Code, § 11378); possession of a controlled substance while armed with a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a)); maintaining a residence for the purpose of selling controlled substances (Health & Saf. Code, § 11366), two counts of child endangerment (§ 237a, subd. (a)); and possession of drug paraphernalia (Health & Saf. Code, § 11364). In addition, Huerta was charged with possession of a firearm by a felon (§ 12021, subd. (a)(1)) and possession of ammunition by a felon (§ 12316, subd. (b)(1)). It was also alleged in each felony count that Huerta had served a prior prison term within the meaning of section 667.5, subdivision (b).

The jury found Mendivil not guilty of all charges. The jury found Huerta guilty of simple possession, a lesser included offense to possession for sale, possession of drug

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[1] All further statutory references are to the Penal Code unless otherwise stated.

paraphernalia and possession of a firearm and ammunition by a felon. Huerta was found not guilty of the remaining charges. He admitted the prior prison term enhancement and was sentenced to the upper term for possession and consecutive terms for the remaining felonies, plus an additional year for the enhancement, for a total term of five years four months. Huerta was sentenced to 90 days for the misdemeanor possession of drug paraphernalia.

DISCUSSION

I. Unanimity Instruction

Huerta contends the trial court was required to instruct the jury with the unanimity instruction, CALJIC No. 17.01, because methamphetamine was found in two locations, on a table in the garage[2] and in a coat located in a closet on the service porch. A door from the service porch to the garage was the only access to the garage from the interior of the residence.

> "In a criminal case, a jury verdict must be unanimous. [Citations.] … Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] [¶] This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.] … 'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.' [Citation.] [¶] On the other hand, where the evidence shows only a single discrete

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[2] The structure referred to at trial and in the briefs as a garage appears to have been a small structure added on to the dwelling at some point and was not large enough in which to park a car.

> crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)
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> "The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*People v. Russo, supra,* 25 Cal.4th at pp. 1134-1135.)

A unanimity instruction was not required in this case. Huerta was charged with a single count of possession of methamphetamine for sale. The prosecution theorized that Huerta possessed all the methamphetamine for sale. The defense theorized the methamphetamine belonged to Huerta and some unidentified friends for personal use, not for sale.

On appeal, Huerta argues that his theory at trial also included an argument that the methamphetamine belonged to his friends. The record does not support this argument. Huerta's closing argument makes brief references to friends owning the drugs, but these references refer to Huerta's initial statement to the police. He quickly changed his story to indicate that he and his friends bought the drugs for personal use. Mendivil told the arresting officers that Huerta used methamphetamine.

Finally, Huerta was convicted of possession of a controlled substance. Ownership is not an element of the crime. (See CALJIC No. 12.00.) Therefore, even if Huerta were

merely holding the methamphetamine for some unidentified friends, he would have no defense to the crime of possession of a controlled substance.

Nor do we find any merit to Huerta's argument that a unanimity instruction was required because the methamphetamine was located in two separate locations. The record as a whole reveals there was no evidence offered, nor argument made, that Huerta possessed the drugs in the garage but not the drugs in the closet. The case focused on whether Huerta possessed the drugs for personal use or for sale.

The focus of the case leads to rejection of the unanimity instruction for two reasons. First, a unanimity instruction is not required where the acts are substantially identical in nature and the jury, believing that one act occurred, must inexorably believe all acts took place. (*People v. Champion* (1995) 9 Cal.4th 879, 932, disagreed with on other grounds in *People v. Ray* (1996) 13 Cal.4th 313, 363, 369, fn. 2.) Here, there was only one act, possession of methamphetamine. If the jury believed that Huerta possessed any of the methamphetamine, they must have believed he possessed all of the methamphetamine.

Second, if a unanimity instruction was required, Huerta would have been exposed to two counts of possession of methamphetamine -- one count for the methamphetamine located in the garage and a second count for the methamphetamine located in the closet. *People v. Theobald* (1964) 231 Cal.App.2d 351 instructs that such a result is not permissible. In *Theobald,* the defendant was convicted of two counts of possession of a controlled substance when marijuana was found in two locations in his house. The appellate court held that only one conviction could stand. A "crime cannot be compounded merely because various portions of the prohibited contraband possessed by him at the specified time are kept or deposited in different places." (*Id.* at p. 353.)

Huerta relies on two cases to support his argument -- *People v. King* (1991) 231 Cal.App.3d 493 and *People v. Crawford* (1982) 131 Cal.App.3d 591. The distinction between these cases can best be demonstrated by quoting the holding from *King*: "We

hold that in a prosecution for possession of narcotics for sale, where actual or constructive possession is based upon two or more individual units of contraband reasonably distinguishable by a separation in time and/or space *and there is evidence as to each unit from which a reasonable jury could find that it was solely possessed by a person or persons other than the defendant*, absent an election by the People CALJIC No. 17.01 must be given to assure jury unanimity. [Fn. omitted.]" (*People v. King, supra,* 231 Cal.App.3d at pp. 501-502, italics added.)

We agree with *King*'s holding, but it has no application to the facts of this case. Here, there was no evidence from which a jury could reasonably infer that the methamphetamine located in either the garage or the closet belonged to anyone other than Huerta. In *King*, there was testimony that some of the drugs belonged to the defendant's boyfriend and some belonged to the defendant's roommate. In *Crawford*, there was testimony that some of the items belonged to the defendant's girlfriend and some belonged to the defendant's roommate. No such evidence was introduced in this trial. Instead, Huerta argued all the methamphetamine belonged to him and his friends. The absence of such evidence eliminated the need for a unanimity instruction.

II. Section 654

Huerta next contends that his misdemeanor conviction for possession of drug paraphernalia must be stayed because the "conduct underlying the possession of methamphetamine and possession of drug paraphernalia for injecting or smoking drugs was indivisible: the paraphernalia obviously was meant to be used to consume the drug."

Section 654 provides in part that an act or omission that may be punished under different provisions of law shall be punished under the provision that provides for the longest term of imprisonment, but "in no case shall the act or omission be punished under more than one provision."

Section 654 applies not only where there was one act comprising multiple crimes but also where there was a course of conduct which violated more than one statute but,

nevertheless, constituted an indivisible transaction. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) "Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the 'intent and objective' of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268.) The determination of whether there was more than one objective is a factual determination that must be supported by substantial evidence. (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

Huerta cites no authority to support his contention that dual punishment for possession of methamphetamine and possession of drug paraphernalia is prohibited by section 654. That is because we have two separate acts. One can possess either drug paraphernalia or methamphetamine but need not possess both simultaneously.

Nor was there any evidence that there was a single course of conduct. The paraphernalia may have been possessed for years, while the methamphetamine may have been a recent acquisition. Moreover, possession of drug paraphernalia is unrelated to possession of methamphetamine. A single course of conduct may arise where the defendant is found consuming the methamphetamine using the drug paraphernalia. Here, however, the items were not being used. Section 654 does not apply to these facts.

DISPOSITION

The judgment is affirmed.